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No. 92-54

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE DESOTO COUNTY BOARD OF SUPERVISORS, WILL RENFRO, FLOYD ROBERTSON, JOHNNY WALLACE, JAMES EARL RILEY AND EULO LOYD,

Petitioners,

v.

NORTH MISSISSIPPI COMMUNICATIONS, INC., PAMELA McPHAIL IVY AND CHARLES M. IVY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the panel opinion of the Fifth Circuit Court of Appeals, which failed to take into account cases involving political patronage in the context of an independent contractor, and which, as a consequence, expands *Elrod v. Burns,* 427 U.S. 347 (1976), *Branti v. Finkel,* 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois,* 110 S.Ct. 2729 (1990) beyond their express limitation to government employees and thereby conflicts with every other circuit which has addressed the issue, should be vacated and the judgment of the district court affirmed.

2. Whether the law of the case doctrine should bar consideration of this purely legal issue where application of the doctrine would result in manifest injustice and clear error.

PARTIES TO THE PROCEEDING

All parties to this proceeding in the Fifth Circuit Court of Appeals whose judgment is sought to be reviewed are:

Petitioners:

The DeSoto County Board of Supervisors
Will Renfro
Floyd Robertson
Johnny Wallace
James Earl Riley
Eulo Loyd

Respondents:

North Mississippi Communications, Inc.
Pamela McPhail Ivy

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JURISDICTION

The Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) for review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 28, 1992 (*NMCI IV*). However, the substantive question presented was not an issue in *NMCI IV*, neither the district court nor Fifth Circuit have ever analyzed this case in the context of the question presented, and the issue was never raised or suggested by the Petitioners until the filing of their Suggestion for Rehearing *en banc*, which was denied on March 29, 1992. Since this case has been remanded to the district court and may travel its well-worn path to the Fifth Circuit again, Petitioners may yet have another opportunity to present the issue to the Fifth Circuit, after which review by this Court may or may not be more appropriate or even requested. Since the Fifth Circuit has not rendered a judgment on the question presented, the instant petition should be considered under Supreme Court Rule 11, and denied since Petitioners have made no showing that this case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

STATEMENT OF THE CASE

This is a case under 42 U.S.C. § 1983 against the DeSoto County Board of Supervisors individually and collectively as the official governing body of DeSoto County, Mississippi. The Respondents are the former publisher of the *North Mississippi Times* and its editor,

Pam Ivy, who was courageous enough to print articles and editorials critical of the corruption which existed within the Board of Supervisors of DeSoto County. Pam Ivy was an idealist who believed that it was the duty of the press, protected by the First Amendment, to report to the citizens of DeSoto County the conduct of their elected officials so that they might be better informed on matters of public concern. At the same time, and for many years before, the *Times* also published minutes of proceedings of the Board and legal notices, bid announcements, and advertisements of various departments of county government including the Board. As the lower courts found, after the critical articles and editorials began to appear in the *Times*, there was a dramatic shift of Board directed ads and publications away from the *Times* to the *Olive Branch Tribune*, a smaller newspaper headquartered in another county. Indeed, the Fifth Circuit has held, and it is now the law of the case, that the Respondents proved that the Board's desire to retaliate against the *Times* for its critical articles and editorials was a motivating factor in their decisions to shift ads from the *Times* to the *Tribune*. *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 655 (5th Cir. 1992).

The compensatory damages sought by Respondents are incidental to the real essence of their complaint against the Board: that the government may not use the award of public benefits, contracts, or business as a device to influence the character of reporting by the press on the government's activities, *e.g.* as a reward for those who "toe the line" and a punishment for those who do not.

There has never been any allegation or proof presented in this case that the Board's shift of ads from the *Times* to the *Tribune* was the result of traditional political favoritism. There is no proof in the record of the political affiliations, if any, of any of the parties involved in this case. Nor is there any evidence pertaining to the Respondents' election endorsement of any of the Petitioners or their opponents. This case was tried and thrice reviewed solely on the basis that the Board withheld county business in order to manipulate the *Times'* editorial policies and to retaliate for the *Times'* exercise of its First Amendment rights. For example, there was testimony that one of the Petitioners told Ms. Ivy that she would receive her share of ads if she would just "straighten up". *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064, 1067 (5th Cir. 1989). This is simply not a case dealing with partisan political patronage.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS IN *NMCI IV* DID NOT EXTEND *ELROD/BRANTI/RUTAN* AND IS NOT IN CONFLICT WITH CASES REGARDING INDEPENDENT CONTRACTORS IN A POLITICAL PATRONAGE CONTEXT.

In order to create justification for immediate review by this Court of the Fifth Circuit's denial of rehearing *en banc*, the Petitioners have seized upon the Fifth Circuit's use of the term "political patronage" in *NMCI II* in an attempt to recharacterize this case as one which should be

governed by *Elrod/Branti/Rutan* and their progeny. However, given the facts and theories presented in the instant case, *Elrod/Branti* et al. are not controlling and are not contrary to the precedent relied upon by the Fifth Circuit here, *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In *Perry*, which is cited in *Elrod, Branti*, and *Rutan*, this Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech." 408 U.S. at 597, 92 S.Ct. at 2697. This is the quintessential case for a strict application of the *Perry* principle: a direct attempt by the government to control the information available to its citizens by economic duress exerted against a small and vulnerable newspaper and its editor.

The *Elrod/Branti* cases present a different scenario. In each of those cases the courts concluded that the governmental action was based solely or primarily on partisan political grounds. For example, in *Elrod*, the petitioners "were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation" with the Cook County, Illinois Democratic Party. *Elrod v. Burns*, 427 U.S. 347, 349, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976). In *Branti*, the respondents were discharged "solely because of their political beliefs". The Republican respondents, who had been appointed by a Republican, were about to be terminated by the recently appointed county public defender, a Democrat. *Branti v. Finkel*, 445 U.S. 507, 508, 63 L.Ed.2d 574, 577, 100 S.Ct. 1287 (1980). In *Rutan*, the governor of Illinois was alleged to have operated "a political patronage system to limit state employment and beneficial employment-related decisions to

those whose are supported by the Republican Party." *Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52, 61, 110 S.Ct. 2729 (1990). In each of these cases the Court was called upon to balance the freedoms and protections afforded by the First Amendment against the state's interest in maintaining the centuries-old practice of political patronage or favoritism, sometimes pejoratively referred to as the "spoils system".

The holding of the Fifth Circuit in *NMCI IV* is not contrary to any of the seven opinions of the four circuits cited by Petitioners. In the leading circuit case, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044, 79 L.Ed.2d 175, 104 S.Ct. 712 (1984), the issue was whether the City of Springfield, Illinois could use political criteria in the award of a contract to install and maintain benches along city streets. *LaFalce* was a prototypical political patronage case since the allegation was that the plaintiff was not a political supporter of the mayor as were the operators of the company to whom the contract was awarded. The Seventh Circuit characterized the governmental conduct as the "practice of favoring political supporters in awarding contracts for public projects . . . ." *Id.* at 293. Following *LaFalce*, the Seventh Circuit in *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 L.Ed.2d 97, 111 S.Ct. 129 (1990), denied relief to a security firm that was denied a city contract because, *inter alia*, the firm had not supported the election campaign of Mayor Washington. In the latest Seventh Circuit case, *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S.Ct. 604 (1991), the

City of Milwaukee refused to extend the plaintiff's parking lot leases, which would have been renewed had the plaintiff not lobbied against a state statute relating the operation of city lots which was supported by the city. While noting that this Court's opinion in *Rutan* "has cast doubt on the validity of the reasoning" of *LaFalce* and *Triad*, 938 F.2d at 709, the Seventh Circuit adhered to those cases holding that the First Amendment does not protect "independent contractors whose bids for public contracts are rejected on the basis of their political views" and that "political favoritism in the awarding of public contracts is not actionable". *Id.* at 709 and 710, respectively.

Downtown Auto Parks is especially noteworthy in the distinction that it draws between political patronage cases and one where an independent contractor was discharged solely because of his speech related decision not to cooperate in a police investigation. *Id.* at 710. *See, Lipinski v. Dietrich*, 78 F.Supp. 235 (N.D. Ind. 1984). *Lipinski* was a post-*LaFalce* decision of a district court in the Seventh Circuit finding that an independent contractor could maintain a First Amendment action for the removal of his name from a list of towing operators approved by the police. The district court held that the case fell within the reasoning of *Elrod* and *Branti* in that the plaintiff was discharged from the towing list solely because of his decision not to cooperate with a police investigation, a right protected by the First Amendment. *Id.* at 240. Under the Petitioner's argument, *Lipinski*, like *NMCI IV*, would be directly contrary to the *Elrod/Branti* progeny since those cases interpreted *Elrod/Branti* as a virtual mandate

that only government employees are protected from victimization by the spoils system. However, the Seventh Circuit in *Downtown Auto Parks* instead distinguished *Lipinski* on the grounds that Lipinski was discharged solely because of speech-related disagreements with the police. The instant case is more similar to *Lipinski* than the *Elrod/Branti* progeny in that it is solely a speech-related case in which partisan political favoritism is not implicated. Therefore, if *Lipinski* is distinguishable from *Downtown Auto Parks, et al.*, so also is *NMCI IV*.

Although the Sixth Circuit case of *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *modified on other grounds*, 924 F.2d 627 (*en banc*), *cert. denied*, ___ U.S. ___, 115 L.Ed.2d 1054, 111 S.Ct. 2889 (1991), presented another set of facts where the complained of conduct was based solely on political affiliation, that case does not belong in this group, and is not contrary to *NMCI IV*, because the Sixth Circuit did not reach the issue for which it is cited by Petitioners. The issue in that case was, for purposes of qualified immunity, whether in 1983 "it was 'clearly established' that the refusal of public officials to grant a public contract to the lowest bidder solely because of political affiliation violated Lundblad's first amendment rights". In holding that such was not clearly established in 1983, the Sixth Circuit stated: "We emphasize that we do not reach the underlying issue of whether *Elrod* and *Branti* should be extended to situations involving independent contractors". *Id.* at 1102.

The Third Circuit's contribution to this line, *Horn v. Kean*, 796 F.2d 668 (3rd. Cir. 1986), is another classic political patronage case where the governmental conduct was based solely on political party affiliation. In that case

state motor vehicle agents who happened to be Democrats were replaced by a newly elected Republican governor. Likewise, in the Eighth Circuit cases of *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982) and *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982), the sole grounds alleged for the governmental conduct was the plaintiffs' lack of favored political affiliation.

As each of the foregoing cases recognized, *Elrod*, *Branti*, and *Rutan* were self-limited to cases involving public employees, as well they should have been since the petitioners in those cases *were* public employees and the Court decides cases on the narrowest grounds possible. Likewise, the facts of those cases were that the constitutionally infirm governmental conduct was based solely or predominantly on partisan political grounds. Neither this Court nor any of the circuits whose cases are cited by Petitioners has ruled that independent contractors are not entitled to First Amendment protection against governmental retaliation based solely on the government's desire to restrain, manipulate, or punish one for its exercise of free speech. Reliance of the Fifth Circuit on *Perry v. Sindermann* in this case is not in conflict with any decision of any other circuit or this Court. The alleged contrary opinions are simply not on the same matter, and the Court should not grant *certiorari* to review this case to decide an issue not squarely presented.

II. THE LAW OF THE CASE DOCTRINE

Because the Petitioners petition for *certiorari* is virtually a verbatim restatement of their Suggestion for Rehearing *en banc*, it includes the argument made to the

Fifth Circuit to consider their newly raised issue as an exception to the law of the case doctrine. While that argument was necessary in the Fifth Circuit, it is not here since the law of the case does not bind this Court in reviewing decisions on writ of *certiorari*. *Christianson v. Colt Industries*, 486 U.S. 800, 817, 100 L.Ed.2d 811, 831, 108 S.Ct. 2166 (1988). However, although this Court has the authority to review any aspect of the decisions below, it does not follow that that discretion should be exercised in each and every case. At some point in litigation the interest of finality must become paramount; there must be an outer limitation on the freedom of a party to force the relitigation of a case by changing its legal theories or raising new issues. This case had been pending for ten years before Petitioners ever raised the political patronage issue, which is, of course, an affirmative defense. Four and one-half years and two appeals passed after the Fifth Circuit cited *Perry v. Sindermann* in *NMCI I* before Petitioners challenged that precedent. *Perry v. Sindermann* is and should remain the law of this case.

CONCLUSION

The Petitioners retaliated against the Respondents to control the exercise of their First Amendment rights to free speech and free press. Petitioners have recharacterized their behavior in this Petition as the innocent exercise of political patronage in order to create a conflict among the circuits where none exits. This defense was never raised at trial or at any of the three appeals to the Fifth Circuit and was raised for the first time in Petitioners' Suggestion for Rehearing *en banc*, summarily

denied by the Fifth Circuit. The Petitioners have made no showing that their most recent defense is of such imperative public importance to justify this Court's deviation from normal appellate practice and the Petition should therefore be denied.

Respectfully submitted,
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